

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

EMILIO RAMOS,

Petitioner:

Civil No. 04-11731-DPW  
Civil No. 98-11857-DPW  
(Crim. No. 93-10253-WD)

SCANNED

DATE: v.

12/3/04

BY: RN

UNITED STATES OF AMERICA,

Respondent:

PETITIONER'S REQUESTING LEAVE OF COURT TO AMEND AND/OR REPLY  
TO THE GOVERNMENT'S OPPOSITION

COMES NOW, the instant Petitioner, Emilio Ramos, pro-se  
(Hereinafter, "Petitioner"), and hereby replies to the Government's  
Opposition as follows:

Statute of Limitations

Antiterrorism and Effective Death Penalty Act of 1996

First, Petitioner's claims should be equably tolled based upon his counsel of record's absolute failure pursuant to Cronic\* to file a requested timely notice of appeal; the fact which is undisputed that when the Petitioner's conviction became final in 1995, the instant Petitioner had an "unlimited time within which to file a motion pursuant to 28 U.S.C. § 2255, so the Antiterrorism and Effective Death Penalty Act of 1996 doesn't apply to him in the first place, as it would involve an Ex-Post Facto application which is unconstitutional. Landgraf v. USI Film Products, 511 U.S. 244, 114 S.Ct. 1483, 1499 (1994). This is further supported by the fact of the Supreme Court's decision in Lindh v. Murphy, (citations omitted) (which clarified the temporal reach of the newly enacted AEDPA, holding that amendments to the Habeas Corpus statute by the

AEDPA do not apply to pending non-capital cases on collateral review.) Therefore, both the Government's argument in its filed opposition and this District Court's June 5, 2000 memorandum, are either contrary to clearly established Federal Law as determined by the Supreme Court of the United States or a misapplication of clearly established Federal Law.

Second, the instant Petitioner, pursuant to the Supreme Court's precedent of Roe v. Flores-Ortega, (citations omitted) avers that contrary to the Government's argument in its opposition, he has more than met and/or established that Attorney At Law, Michael Avery, (or his associate Jennifer Meyerhardt) was **constitutionally** and statutorily ineffective for not conferring with him following his January 17, 1995 sentencing about whether or not he wanted to file a timely notice of appeal from his conviction and sentence imposed. Please see, Evidentiary Hearing Transcript, dated May 12, 2000, at page 15 for your information, review and consideration, attached as Exhibit I.

Third, Elizabeth Prevett, Esquire, Assistant Federal Public Defender, was never given permission by the Petitioner nor his verbal and/or written consent to dismiss the Petitioner's § 2255 proceedings in Civil Action No. 98-11857-DPW (Criminal No. 93-10253-WD).

Fourth, the Petitioner wasn't even arrested in the possession of any known narcotic drugs; especially heroin, nor was the Petitioner arrested with any guns. In fact, the Petitioner was arrested in New York City on September 29, 1993, almost three years after the charged offense to which he plead guilty to Count 3 of the indict-

1 little bit more about what transpired the issue -- let  
2 me tell you how I see the issue, although I gather you  
3 have read my memorandum concerning this here.

4 MR. RAMOS: Yes.

5 THE COURT: The issue arises -- that you raised  
6 arises if you made some effort to have your lawyer during  
7 the period in which you could appeal consult with you  
8 about what the grounds for the appeal are.

9 I will have a transcript prepared of the  
10 conversation that we had earlier today with Mr. Avery.  
11 But I think I can tell you that what he said was that he  
12 has no specific recollection of the conversations there;  
13 that his assistant, Ms. Myerhart, had wrote a letter to  
14 you on January 18th, 1995, advising you further about what  
15 the sentence was, but that there was no indication at that  
16 time in the letters, anyway, --

17 MR. RAMOS: Right.

18 THE COURT: -- that there was a desire to  
19 appeal; that the desire to appeal in the letters, anyway,  
20 and communications didn't first occur until May of 1995.  
21 And, so, it is of some interest to me whether or  
22 not there was such a conversation immediately after the  
23 sentence itself was imposed in which you made some inquiry  
24 about what your appeal rights are and what you could do.  
25 MR. RAMOS: Yes.

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1 THE COURT: The submissions that you made make  
2 reference to a phrase "good luck on your appeal." That  
3 phrase does appear in one of Ms. Myerhart's letters here.

4 MR. RAMOS: Right.

5 THE COURT: But let me go back then. Did you  
6 have a conversation with Mr. Avery or Ms. Myerhart or  
7 someone associated with Mr. Avery within the 10 days after  
8 the sentence was imposed indicating in some fashion your  
9 desire to appeal that case at that time?

10 MR. RAMOS: No, I didn't because I had -- when I  
11 was getting sentenced, I had asked him "are you going to  
12 fight the two-point enhancement?" And he had told me "I  
13 don't want to bring it up because I think if we fight it,  
14 it might affect your sentence." So, then I didn't even  
15 bring it up, you know. I didn't bother him no more about  
16 it. But then later on, I learned that even if I would  
17 have had fight it or fought it, it would not have affected  
18 my sentence. You know, I was like illiterate to the rules  
19 and regulations. I didn't know how none of that would  
20 affect me.

21 THE COURT: Right, right. But if I can  
22 understand, you had a conversation with him before the  
23 sentencing about, you know, how the Sentencing Guidelines  
24 were going to work and whether or not there would be a  
25 two-point enhancement for the --

MAY 12, 2000

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1 MR. RAMOS: i. He had explained that to me.  
2 But when I got sentenced, it was like a spirit of the  
3 moment. Like I asked him, "Are you going to fight the  
4 two-point enhancement," you know, because we had spoke on  
5 that. Before I got sentenced, we had spoke all about that  
6 and he said he's going to try to fight it at court.

7 THE COURT: Yes.

8 MR. RAMOS: And then when I bring it up again at  
9 sentencing, he said, "I don't think we should touch that.  
10 I think you should just let it go and just, you know,  
11 leave it like you were doing it and don't touch it because  
12 it might affect your sentence."

13 THE COURT: So that was a conversation  
14 immediately before the sentence?

15 MR. RAMOS: No. That occurred at sentencing.

16 THE COURT: At the time of the sentencing --

17 MR. RAMOS: Yes.

18 THE COURT: -- while we were having the hearing  
19 on the sentencing?

20 MR. RAMOS: Right. This was like a conversation  
21 between us two, you know, not out loud at sentencing.

22 THE COURT: Right. Now, I want to focus on the  
23 time period after the sentence is imposed. That is --

24 MR. RAMOS: Oh, okay.

25 THE COURT: -- after I've entered the judgment,

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1 the piece of paper that says that you're sentenced to the  
2 particular sentence. Did you have a conversation with him  
3 then?

4 MR. RAMOS: Okay. I had spoke to him by phone  
5 and I wrote him a letter stating if he could help me out  
6 and represent me on appeal. And he had told me, "I can no  
7 longer represent you, you're going to have to find another  
8 lawyer to represent you and, you know, good luck on your  
9 appeal."

10 THE COURT: Now, when did that conversation or  
11 that letter or correspondence take place; do you recall?

12 MR. RAMOS: I believe it was in '95. I've got  
13 no indication of exact date. But like you said, you've  
14 seen that on one of the letters --

15 THE COURT: Right.

16 MR. RAMOS: -- when he said "good luck on your  
17 appeal." But that letter somehow, through me moving  
18 or transferring from one place or another, it got lost.

19 THE COURT: Okay. I guess for my legal  
20 purposes, the focus has to be on that 10-day period  
21 between my actually entering the order and what is the  
22 end of the regular appeal period.

23 MR. RAMOS: Okay.

24 THE COURT: And I take it that during that  
25 particular time period, you did not have a conversation

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# CERTIFICATE OF SERVICE

I, Emilio Ramos, hereby certify that I have served a true and correct copy of the foregoing:

"Petitioner's Requesting Leave To amend And/Or Reply to the Government's Opposition"

Which is deemed filed at the time it was delivered to prison authorities for forwarding to the court, Houston vs. Lack, 101 L.Ed.2d 245 (1988), upon the court and parties to litigation and/or his/her attorney(s) of record, by placing same in a sealed, postage prepaid envelope addressed to:

Hon. Judge Douglas P. Woodlock  
United States Courthouse  
John Joseph Moakley  
One Courthouse Way  
Boston, MA 02210

UNITED STATES DISTRICT ATTORNEY'S OFFICE  
Robert L. Peabody AUSA  
U.S. Courthous, John Joseph Moakley  
1 Courthouse Way, Suite 9200  
Boston, MA 02210  
and deposited same in the United States Postal Mail at the United States Penitentiary,

Signed on this 15th day of November, 2004.

Respectfully Submitted,

  
Emilio Ramos

REG. NO. 35179-054

U.S.P. Lewisburg  
P.O. Box 1000  
Lewisburg, PA 17837